IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.199 OF 2006

Halimabi Amirshaha Rajguru & Ors. ...Appellants

Vs.

Julekhabi Shaikh Yakub & Ors. ...Respondents

Mr.R.V.Govilkar for the Appellants
Ms Yasmin E. Tawaria for the Respondents.

CORAM: A.S.OKA, J.
DATED: MARCH 16,2006.

P.C.:

1. Heard Shri Govilkar for the Appellants. The Appellants are the original Defendant Nos.1 to 5. The Respondent Nos.1 to 3 are the original Plaintiffs and the Respondent Nos.4 to 6 are the original defendant Nos.6 to 8. Respondent Nos.1 to 3 are the real sisters and the Respondent Nos.4 to 6 are their real brothers. The case of the original Plaintiffs is that the suit house was let out to one Yunus Khan Ismail Khan as a monthly tenant. According to the case of the Plaintiffs, the present Appellants were not related to the said Yunus Khan in any manner. According to the case of the Plaintiffs, the Appellant No.1-Defendant No.1 was deserted by her husband and thereafter she was residing with Yunus Khan. The Appellant Nos.2 and 4 are the sons of the Appellant no.1 and the Appellant Nos.3 and 5 are the wives of the Appellant Nos.2 and 4 respectively. According to the Plaintiffs the said Yunus Khan died on 28th May 1998. A suit for possession was filed by the Plaintiffs against the Appellants on the ground that the Appellants have become trespassers in the

premises occupied by Yunus Khan.

2. A written statement was filed by the Appellant Nos.1 to 4. The contention in the written statement was that the Appellant Nos.2 and 4 were sons of the Appellant No.1 begotten from her first husband. On 18th April 1979, the Appellant no.1 legally married to the said Yunus Khan and thereafter she started residing with the said Yunus Khan along with Appellant Nos.2 and 4. The case of the Appellants is that the Appellants being the members of the family of the said Yunus Khan at the time of his death, they have become the tenants in respect of the suit house and therefore Civil Court has no jurisdiction to entertain the suit.

3. The Trial Court decreed the suit by holding that the Appellants have failed to prove that they were residing with Yunus Khan as members of his family. The Trial Court held that the Appellants have failed to prove that they are the tenants of the suit house and therefore, the Civil Court has jurisdiction to entertain and try the suit. The Appellate Court in an Appeal preferred by the present Appellants confirmed the findings and the decree passed by the Trial Court.

4. Shri Govilkar appearing on behalf of the Appellants submitted that Anwar, the Appellant No.2 who is the son of the Appellant No.1 was examined as a witness and therefore it

was not necessary for the Appellant No.1 to step into witness box. All the facts constituting the defence of the Appellants were within the personal knowledge of the son of the Appellant No.1. He submitted that the Appellate Court has made an error by drawing adverse inference on account of non-examination of the Appellant No.1. He pointed out that the original Nikahnama evidencing the marriage between the Appellant No.1 and the said Yunus Khan was produced in the Trial Court and after perusing the original Nikahnama the Trial Court returned the original Nikahnama and a true xerox copy of the same was taken on record. He submitted that the Appellate Court has committed an error by holding that a copy of Nikahnama produced at Exh.67 was not admissible in evidence as it was a xerox copy of the original document. He submitted that the Nikahnama is an evidence of the fact that there was a valid divorse between the Appellant No.1 and her first husband. He submitted that in any event for a long time the Appellant No.1 and the deceased Yunus Khan were staying together as husband and wife and therefore the Appellant No.1 will have to be treated as member of the family of the said Yunus Khan.

5. I have considered the submissions. In my view the Appellate Court was right in holding that it was necessary for the Appellant No.1 to step into witness box. It was the specific case of the Appellants that the Appellant no.1 lawfully married with deceased Yunus Khan on 18th April 1979.

The factum of the marriage could have been established by examining the Appellant No.1. she was the best available witness to prove the alleged marriage. It is pertinent to note that the son of the Appellant No.1 who stepped into witness box was only 14 years old in the year 1979.

6. The Appellate Court has not rejected the document of Nikahnama at Exh.67 only on the ground that it was a xerox copy. The Appellate Court held that the Appellants have failed to examine either attesting witness to the Nikahnama or the Kazi who was allegedly present at the time of Nikahnama. Failure to examine the said important witnesses along with failure of the Appellant No.1 to enter into witness box compelled the Appellate Court to take a view that the Nikahnama is not duly proved in accordance with the law of evidence.

7. The Appellate Court has rightly held that even assuming that the Nikahnama was duly proved, there could not have been a valid marriage between the Appellant No.1 and the said Yunus Khan as no evidence was led to show that the first husband of the Appellant No.1 was either dead at the time of alleged marriage with Yunus Khan or there was a valid Talaq. The Appellate Court found that in the written statement there was not even a pleading that either the first husband of the Appellant No.1 had died or a divorce had taken place in between the Appellant No.1 and her first husband before 1979.

The evidence of the Appellant No.1 was very relevant on this aspect. However, the Appellant No.1 has not chosen to enter the witness box.

8. Even for recording a finding that the Appellant No.1 was residing with deceased Yunus Khan as his wife for a considerable long time, it was necessary for the Appellant No.1 to step into witness box.

9. Hence, no fault can be found with the findings recorded by the Courts below that the Appellants were not members of the family of deceased Yunus Khan. That is the reason why it is held that the Appellants are the trespassers as they have no right to occupy the suit house. Accordingly, decree for possession has been rightly passed.

10. No substantial question of law arises. Second Appeal is dismissed with no order as to costs.

Judge.